No. 2511

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAS. F. FINDLAY, T. CLIVE DAVIES and W. H. BAIRD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERNCA,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

Upon Writ of Error to the United States District Court of the Territory of Hawaii.

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BRIEF FOR PLAINTIFFS IN ERROR

This case comes to this court upon writ of error to the United States District Court of the Territory of Hawaii. Suit was brought by the United States of America, defendant in error, against plaintiffs in error, above named, to recover Seventy-nine Hundred and Sixty ($7960.00) Dollars on a bond of the plaintiff in error, Findlay, master of the British ship "ORTERIC," as principal and the plaintiffs in error, Davies and Baird, as sureties.

The bond in question was executed, after Findlay, the master of the Orteric, had been notified by the Collector of Customs of the port of Honolulu that penalties aggregating Seventy-nine Hundred and Sixty ($7960.00) Dollars had been incurred by him for alleged violations of the "Passenger Act of 1882" and as amended, "to insure the payment of such penalties for such violations aforesaid as shall be determined by the Department of Commerce and Labor to have been incurred by the said master after the presentation, within a reasonable time, by the said master, or his agents or attorneys, and the officials of the United States at said Honolulu, of the facts to said Department"

and was conditioned upon the "payment to the United States through the Collector of Customs at the port of Honolulu of the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred."

By stipulation, the case was submitted to the court —jury waived.

The evidence disclosed that on April 17, 1911, soon after the arrival of the S. S. ORTERIC in Honolulu, the master was given a written notice by the Collector of Customs that penalties aggregating to Seventy-nine Hundred and Sixty ($7960.00) Dollars had been incurred by him for alleged violations of the Passenger Act of 1882; the notice setting out

that the following sections of the Passenger Act had been violated and the penalties incurred:

"Sec. 2, relating to berth: penalty $5.00 for each passenger.
"Sec. 3, light and ventilation: penalty $250.00.
"Sec. 4, food: misdemeanor punishable by fine of $500.00.
"Sec. 5, physician and hospital: penalty $250.00.
"Sec. 6, discipline and cleanliness: penalty $250.00.
"Sec. 7, posting notice that ship's company cannot visit steerage quarters: penalty $100.00.
"Sec. 9, passenger manifests: penalty fine not to exceed $1,000.00."

The notice further called the master's attention to Section 13 of the Act making such penalties, etc., a lien upon the vessel.

Thereafter, at the request of Theo. H. Davies & Company, Limited, the collector cabled to the Secretary of Commerce and Labor for permission to grant clearance upon a satisfactory bond being furnished for the payment of any penalties which might be imposed. The Acting Secretary replied granting his approval. The bond (Ex. 1) involved in this suit was given.

Thereafter there was submitted by Holmes, Stanley and Olson, on behalf of the master for presentation to the Department of Commerce and Labor, the following documents:

Affidavit of Captain Jas. Findlay, master of the S. S. ORTERIC, and attached thereto

Confirmatory affidavits of Arthur Atkins, Chief Officer, and of John Hopkins Pugh, Ship's Doctor;

Affidavit of John Hopkins Pugh;

Affidavit of Edith Hyde, one of the nurses on the Orteric;

Copies of notices required by Section 7 of the Passenger Act of 1882, as amended, in the English, Portuguese and Spanish languages, which were posted on the Orteric.

The affidavit of the master sets forth that on the 24th day of February, 1911, the S. S. ORTERIC left Gibraltar for Honolulu with about 1,500 emigrants, of which 550 were Portuguese and the rest Spaniards; that on the 5th day of March, 1911, a pitched battle occurred between the Spanish male passengers on one side and the Portuguese on the other; that theretofore all single male passengers were berthed in a compartment divided off from the other passengers by well secured bulkheads, but that after said riot, the Portuguese male passengers absolutely refused to remain berthed with the Spanish passengers, stating that they were in fear of having their lives taken by the Spanish male passengers; that to prevent bloodshed and loss of lives, affiant deemed it mandatory to segregate the Portuguese passengers from the Spanish and therefore removed the Portuguese male single passengers aft;

Ventilation: that the vessel had been inspected and approved by the Portuguese authorities; that affiant believed that the ventilating devices in each compartment were equal in capacity to the specifications set forth in Section 3 of the Passenger Act and

reference was made to the plans which were to be obtained from the London owners of the vessel;

Closets: that the closets were sufficient in number according to the regulation of Section 3 and were all enclosed, and were located on the upper deck.

Milk was served twice a day and at all times was supplied upon application to the mothers of infants and to children;

Hospitals: that the vessel contained two hospital compartments on the upper deck regularly fitted and ventilated and lighted by large skylights and portholes; and additional temporary hospitals more than 1500 square feet in area were located on the shelter deck, whose ventilation and lighting were described;

Discipline and Cleanliness: the master shows that the unsightly condition of the ship, when the Custom officers boarded it, was due to the excitement among the passengers upon arriving at their destination which caused them to throw the remains of breakfast about the decks, tear up mattresses for bags to hold their belongings and to refuse to clean up as usual; that the failure to air belongings and bedding during the voyage was due to the refusal of the passengers who stated that their belongings would be stolen;

That at the beginning of the voyage copies in Spanish and Portuguese of Section 6 of the Passenger Act were posted in all the companionways and in various parts of the vessel; that some were torn down during the voyage but were again posted two weeks before the arrival of the vessel;

That the confusion in the manifest resulted from the shifting of the passengers after the riot.

The affidavit of the first officer and of the ship's doctor confirmed the statements of the master in all respects.

The affidavit of John Hopkins Pugh, the ship's doctor, showed his education and training and wide experience as ship's doctor on various immigrant ships. Affiant declares that he directly superintended all of the sanitation and sanitary measures on board the Orteric and the medical attention of all patients aboard; that under his direction all compartments and decks were swept not less than twice daily and were also disinfected with a dry powder; that he would not permit the washing of compartments occupied by passengers because, according to his opinion and the experience of medical men in such circumstances, the dampness which necessarily results, has been proved to be highly detrimental to the health of the passengers; that the sleeping compartments were scraped and swept every day. The doctor also states that the litter found aboard at Honolulu was the result of food and rubbish and the contents of mattresses being thrown about the deck by the passengers in their haste to land; that the mortality among the children was largely due to the concealment by the parents of the ailments of their children. He also supports the statement of the master concerning the milk supply and the hospital equipment. Further, he states that the water for bathing was unlim-

ited and that the usual accommodations for washing existed.

The affidavit of Edith Hyde, one of the nurses aboard the Orteric, contains in substance the assertions made by the master concerning the hospitals, the supply of milk to mothers and to infants and the riot between Portuguese and Spanish passengers.

The Collector of Customs forwarded these affidavits and the copies of the posted notices to the Secretary of Commerce and Labor and also, in addition to the bond and cablegram referred to above, a report of the inspectors of the vessel, a copy of a letter from the Portuguese Consul, addressed to the Governor of Hawaii, containing a discussion of the deaths among the children aboard the Orteric and the lack of sanitary precautions aboard said vessel, several letters between the Collector and the District Attorney, an extract from a purported report of the Grand Jury relative to the S. S. Orteric, which extract states in substance that it, the Grand Jury, was requested by the Collector of Customs and the United States District Attorney to make a report relative to conditions on board the Orteric in order that the proper department at Washington, in inflicting the fines and penalties, if any should be inflicted, should have the benefit of the Grand Jury's investigation. The report discusses the alleged violation of the Passenger Act relating to the segregation of the sexes; it also stated that the law relative to ventilation was not complied with, that the hospials were unfit for the purposes for which they were provided, that the pro-

visions of the act relating to cleanliness had been violated in a manner which could not be too strongly condemned, and the opinion concludes with the statement that, on the whole, with the evidence before it, the Grand Jury would probably have returned an indictment had it not been for the action of the owners in submitting the fact to the Department of Commerce and Labor for its determination. In addition to the above mentioned document several letters from Holmes, Stanley and Olson, attorneys for the master of the Orteric, dealing with the presentation of the facts to the department, and several letters from Messrs. Baker, Sheehy and Hogan, a Washington firm of attorneys, to the Secretary of Commerce and Labor, were before the secretary.

On December 4, 1911, the Acting Secretary of Commerce and Labor sent a letter to the Collector of Customs in Honolulu, reviewing the report of the Grand Jury, and stated that "in the opinion of the department, penalties aggregating $7960.00 were incurred in this case for violation of the sections enumerated and it declines to interfere in behalf of the offenders."

Thereupon suit was instituted upon the bond, the complaint reciting the execution of the bond, the condition of the bond and

"that thereafter * * * the Department of Commerce and Labor, through the secretary thereof, did determine that the said James F. Findlay was liable to the United States of America on account of certain penalties * * * and did on the 4th day of

December, A. D. 1911, determine that said liability, on account of said violation, did amount to the sum of $7960.00";

And that notice of the determination was given to the defendants and demand for payment made upon them, but that they refused to pay the same.

The court decided "that the bond could not be sustained on its face" (page 28), but after the case was reopened and additional evidence consisting of the Grand Jury's report, the letters, etc., above referred to, had been introduced, the court found that the bond did not contemplate an arbitration of any controversy;

"That the parties did not intend a submission of facts with the object of a determination of the master's guilt or innocence of the law's violation—an arbitration—but that the parties had in view a submission of facts with the object of a remission of the penalties to which the actual violation of the law had made the master confessedly liable" (page 31).

After the court had made its findings and before the entry of judgment, a motion in arrest of judgment going to the sufficiency of the declaration was made. The overruling of this motion is assigned as error.

On June 17, 1913, the court gave judgment for the plaintiff for the sum of $7960.00 penalties, and interest thereon from the date of the secretary's notice, and costs, a total of $8960.30. The entry of this judgment was duly excepted to and is urged as error.

ERRORS RELIED UPON.

Upon the trial, the plaintiffs in error objected to the introduction of the above-mentioned evidence consisting of the extract from the Grand Jury's report, the copy of the report of the inspectors from the collector's office, and the various letters dealing with the sanitary condition of the Orteric, on the grounds that such letters, reports, etc., were hearsay and represented in many cases the opinion of the declarants as to the guilt of the accused, and were in no way binding on the defendants, plaintiffs in error. The objections were overruled and exceptions duly noted. The admission of this evidence is now urged as grounds for a reversal of the judgment.

ERRORS I TO XI Inclusive (pp. 53-59).

The trial court, in its decision, found that there had been a submission to the Secretary of Commerce and Labor for the purpose of obtaining remission of penalties which the master of the Orteric had admittedly incurred. This finding is claimed to be erroneous.

ERRORS XII, XIII, XVI and XVII (pp. 59-60).

The trial court found that the bond sued upon was not a contract to submit to the Secretary of Commerce and Labor the question of whether or not any liability had been incurred by the master and vessel and the extent of such liability, if any. This finding is claimed to be erroneous.

ERROR XVIII (p. 60).

The trial court found that the vessel and its master were estopped to deny that an application had been made to the Secretary of Commerce and Labor for the remission of penalties incurred. This finding is claimed to be erroneous.

ERROR XIV (p. 14).

Upon motion in arrest of judgment made by the plaintiffs in error in the court below, the trial court held that the complaint stated a sufficient cause of action. This ruling is claimed to be erroneous.

ERRORS XXI and XXII (p. 60).

The trial court admitted the evidence heretofore referred to over the objections of the plaintiffs in error, on the ground that the bond sued upon was ambiguous and required explanation. It is claimed by the plaintiffs in error that the bond is unambiguous and therefore that this ruling was erroneous.

ERROR XXIV (p. 61).

It is contended by the plaintiffs in error that the trial court erred in finding in favor of the defendant in error and in entering judgment for the defendant in error against the plaintiffs in error.

ERRORS XXIII, XXIV and XXV (pp. 60-61).

ARGUMENT.

The defendants plaintiffs in error contended below, and now contend, that the bond was not binding because:

I. No authority is granted to the Collector of Customs whereby he can legally impose fines and

penalties for alleged violation of the Passenger Act of 1882.

II. That any attempt to withhold the issuance of clearance papers till such alleged fines or penalties were paid or secured was illegal and ultra vires.

III. That a bond given on the certainty that clearance papers would not be issued otherwise, is given involuntarily under duress and is without consideration.

IV. That the Secretary of Commerce and Labor cannot legally determine the amount of fines and penalties incurred by the master.

V. That the Secretary has not judicially determined the amount of such fines and penalties.

VI. That the so-called decision of the Secretary of Commerce and Labor cannot be binding as an arbitration, or award or a compromise of a disputed claim since the Collector of Customs had no authority to enter into a submission on behalf of the government.

That no authority is granted to the Collector of Customs or to the Department of Commerce and Labor to determine the amount of fines and penalties incurred by alleged violations of the Passenger Act of 1882, as amended, is obvious. An examination of the statute shows that the various sections provide for fines, penalties and, in some cases, imprisonment. Though the penalties and fines may be recovered in a civil proceeding, to wit: in an action of debt, they are penal in nature. The recovery in an action of debt is based upon the old contract

theory of the formation of the state and its government, upon the theory that the individuals contracted to submit to the penalties that might be imposed by the state. The result of this implied contract was that upon the imposition of the penalty by the state, a debt arose. The action is penal in its nature rather than civil; that is, it is the imposition of a penalty rather than a recovery of damages. A penalty or fine, the name it is called by, is immaterial; the object is penal—punishment rather than damages.

Though it might be

> "within the competency of Congress to provide for the imposition of penalties by an executive officer, and the enforcement is not necessarily governed by rules concerning the prosecution of criminal offenses"

as decided by the case of *Oceanic Steamship Company vs. Stranahan,* 214 U. S. 321, in the absence of any such provision by Congress and in the presence of a general provision for recovering penalties, the general method must be employed, which is by suit. It might be legal for Congress to give the power to the Collector of Customs or to the Secretary of Commerce and Labor or to both of them, to impose and collect the penalties provided in the Act, yet this Act gives them no such authority and we contend that no penalty can be imposed until there has been a judicial determination of liability either in a criminal or civil proceeding. When fines and penalties are provided for in some case having a wide range be-

tween the maximum and minimum penalties and no method or machinery is especially provided for their determination, imposition and collection except Section 13, which says:

"a vessel shall be liable and may be libelled therefor in any Circuit or District Court"

it cannot be urged that the Collector of Customs or the Secretary of Commerce and Labor can determine the liability and the amount of such fines and refuse to issue clearance till this amount is paid or secured by a contract entered into to pay such amounts as the Secretary, reviewing the evidence, may determine. *Oceanic Steamship Company vs. Stranahan,* supra, is to the effect that:

"Money paid to a Collector on the certainty that clearance papers will not be issued, is paid involuntarily and if unlawfully exacted can be recovered."

As pointed out in the decision of the trial court, if the Collector of Customs or the Secretary of Commerce and Labor cannot determine and enforce the collection of the amount of penalties, exacting a bond cannot give them this authority. He cannot do indirectly what he cannot do directly. If he could do so, under this reasoning, the judicial power could be transferred by the executive officials to themselves by merely exacting a bond whereby the accused agrees to pay such penalties as they might determine. Whether the penalties can be recovered in debt or in a proceeding, after an indictment, or

whether they can be determined in an action in admiralty by a proceeding against the vessel, most clearly there is no provision whereby the Collector or the Secretary of Commerce and Labor can impose or collect them. Where no form of recovery of the penalties is provided, the recovery must be in the District Court in action of debt, and further in the action, the master is entitled to a Jury trial, under the seventh amendment of the Constitution, though there might be a proceeding in admiralty against the vessel and the liability be the same.

The Queen, 4 Ben. 237, Federal Case No. 16107.

We think it does not need much argument to show that there has never been a legal determination of liability of the master or sureties in this case. The notice of the Collector of Customs that the master had incurred such penalties was not such a determination since the Collector of Customs had no authority to impose or determine the amount of penalties, if any had been incurred. Nor was the decision of the Acting Secretary of Commerce and Labor to the effect that:

"In the opinion of the Department, penalties aggregating $7960.00 had been incurred in this case and that it declined to intervene in behalf of the offenders"

a determination of liability unless the bond gave the Secretary the power to determine the amount of the defendants' liability. If the bond did give the Secretary this authority, it could only be on the ground that the matter in controversy had been submitted

on behalf of the government and on behalf of the defendant and an award or compromise made pursuant to such submission. As pointed out in several cases cited in the decision of the trial judge (an especially good one is the case of *U. S. vs. Ames,* 1 Wood and M. 76), no officer of the United States has authority to enter into a submission on behalf of the government. In that case when the defendant in an action for overflowing land belonging to the United States pleaded a submission of the matter in controversy by the District Attorney on behalf of the government and an award pursuant thereto, the court held the award not binding on the United States.

"The objection to the validity of the award is in my view decisive that there is a want of authority in an officer of the United States to enter into a submission in their behalf which shall be binding. All judicial power is by the Constitution vested in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish. Const., Art. 3-1. No department or officer has a right to vest any of it elsewhere; and it has been questioned even if Congress can vest it in any tribunal not organized by itself. (1 Wheat, 304, 330, 336, and authorities cited in the case of the British prisoners. 1 Wood. and Minot 70.) It is our duty to take notice that no Act of Congress has granted any authority to any arbitrators in cases like this; and hence though the former District Attorney speaks in the award as if authorized to submit this case, he doubtless means that he was 'authorized 'by the solicitor of the treasury or war department to do so and not by any special law. As we are bound to know that neither he nor they were authorized by any law for that purpose, it follows that any arrangement by the solicitor of the treasury or by the war department or

by the District Attorney to refer such a claim is not binding. (*U. S. vs. Nicell*, Paine 646.) Such submissions and awards are sometimes useful, as they may be afterwards accepted and voluntarily enforced by the proper authorities as a guide as to what is supposed to be nearly right and safe; but I can see no *legal ground* on which their execution can be compelled by a court of law. The case of the disputed title to the pea patch in the Delaware Bay, is familiar to many of us, where a most inconvenient delay has occurred, in authorizing a reference of the dispute by a special Act of Congress, it being conceded that no authority already existed for making such a reference."

U. S. vs. Ames, supra.

It is elementary that if parties enter into a submission concerning a subject matter over which one of the parties had no authority an award is a nullity.

Wyat vs. Benner, 23 Barb. 327.

An award to be good must be mutual in the sense that it will be a discharge of all future claim by the party in whose favor the award is made.

Pinion vs. Delavan, 1 Caines 304.

An arbitration and award that include one party only is an anomaly in the law.

Gordon vs. U. S., 7 Wall. 188.

We think it is clear that Collector of Customs or the Secretary of Commerce and Labor had no authority to collect any fines or penalties that the master may have rendered himself liable to; no more so than they could determine the term of imprisonment that he may have rendered himself liable to. They could not by receiving a cash payment, compromise the claim whether the amount was arrived at by way

of an award of an arbitrator or the amount was arrived at by way of compromise between the parties. Can the Collector, not being able to compromise or submit the question directly, do the same thing by means of a bond?

This cannot be considered a compromise of a disputed claim. It is now provided by statute that upon a report by the District Attorney or any special attorney or agent having charge of any claim in favor of the United States showing in detail the condition of such claim and the terms upon which it can be compromised and recommending that it be compromised upon the terms so offered and upon the recommendation of the solicitor of the treasury, the secretary of the treasury is authorized to compromise such claim accordingly. This statute, however, must be complied with before any compromise can be regarded as legal. Thus in *U. S. vs. George,* 6 Blatchf. 406, Fed. Case 15,198, where the terms agreed upon by the secretary were never reported or recommended by the District Attorney, the action of the secretary was held of no effect as a legal compromise. See also *Grey Jacket,* 5 Wall. 369. Clearly the collector of Customs is an official to collect information concerning vessels and not one to impose such fines and penalties. Harmon, in 21 Op. Atty. Gen. 361, holds that the comptroller is not a special attorney or agent that can recommend a compromise; he "does not have charge in the same sense that a district or special attorney or agent has, viz., for the express purpose of directly enforcing them."

The trial court, recognizing the soundness of the contention that there could be no "submission of fact with the object of the determination of the master's guilt or innocence of the law's violation," in a labored conclusion stated that the parties did not have in mind what the bond stated, that is, a determination of the alleged violations and what the declaration stated, to-wit, that the Department of Commerce and Labor did determine that the master was liable on account of certain penalties, but that the parties had in view "a submission of fact with the object of a remission of the penalties to which the actual violation of the law had made the master confessedly liable."

Three objections, each equally decisive, can be made to this finding. The first is, that all the evidence, the wording of the bond and the complaint itself show that there was an attempt and an intent to submit the question of liability for "alleged" violations of the law to the determination of the Secretary of Commerce and Labor; the second, there is no evidence showing that the master ever admitted his guilt or violation of the law to the extent found or to any extent, but on the contrary strenuously denied the same and submitted evidence to sustain his claim of innocence; the third is that even though the master admitted his violation of the law and applied for the remission of the penalties, still this would give no authority to the Secretary to determine the amount of the penalties, but upon the Secretary's "refusal to interfere," the master's guilt and the extent of his

punishment would have to be determined in a court of law in which his admissions might be evidence. Admitting for the sake of argument that the Secretary of Commerce and Labor, having power to remit penalties, may "in order to prevent the wrong-doers playing fast and loose with him exact a bond as an assurance of good faith and to secure in case of denial of remission full satisfaction of the penalty incurred by him," yet he could not exact a bond giving himself the power to determine the amount of this penalty in case he refused a remission. It might well be that the Secretary would have power to exact a bond whereby the accused would be bound to pay such penalties as might be found in a proper tribunal to have been incurred in case the Secretary refused remission, but the penalties incurred and the amount of liability therefor could only be determined by a court. This phase of the question will appear more clearly under the discussion of "common law bond."

It is impossible to see how the court found that there was an admission of guilt in the present case, a fundamental premise to the court's decision. Taking all the so-called evidence (the admissibility of much of this will be discussed hereafter), there is no showing that the master admitted his guilt, but on the contrary the affidavit of the master and the officers tended to show, at least attempted to show, that the law had not been violated. For example, in his affidavit the master claimed that the construction of the closets complied with the law; that the construc-

tion of the hospital, its ventilation, etc., complied with the law; that the food and milk supply was ample and complied with the law; that the ship was kept in a sanitary condition, being swept twice a day, and that all sleeping compartments were swept and scraped every day and disinfected with dry powder; that the sleeping compartments were not washed because the doctor ordered the dry cleaning; that the large number of deaths among the infants was largely due to the concealment of the children's ailments by their mothers and not to conditions on board the vessel. Further, the evidence submitted by the master regarding alleged violations of Sections 6 and 7 of the Passenger Act shows that notices were posted but some of them were torn down by the passengers and that they were again posted. If there was no negligence on the part of the master in keeping the notices posted, there would be no liability under this section. Certainly the evidence of the master tended to show that he had exercised due diligence in this matter. He further claimed that the removal of the male Portuguese passengers from the compartment set aside for single males was rendered necessary for the purpose of preventing bloodshed and saving life. This claim was not in mitigation of the offence, but was by way of defense, and certainly the master thought that the provision requiring the separation of sexes was not an absolute one, but that the necessity of saving life would be a defense.

Thus in the case of *Charles Nelson,* 149 Fed. 846,

which holds that a steamship which left San Francisco a few days after the earthquake was not subject to the penalty prescribed by the Revised Statutes, Section 4465, for carrying more steerage passengers than the number allotted by her inspection certificate, and was not liable to the passengers in damages for the inconvenience of the overcrowding and the shortage of water where the excess was due to the confusion caused by the destruction of the city and the shortage of water was due to the company's inability to procure water or sufficient coal for its condenser in San Francisco and the bad weather which prolonged the voyage.

See also the *Geneva* 26 Fed. 647, which decides that where the excess of passengers is due to intruders, there is no liability for violating this section. See also *Beck vs. Johnson,* 169 Fed. 154.

Other evidence in the case, such as a letter from Davies & Company, which as a statement of the ship's agent might be considered admissible, shows clearly that the Secretary of Commerce and Labor was to determine the question of alleged violations.

EXHIBIT VII, pp. 118-119.

The contention was made in the court below that "even though the Secretary of Commerce and Labor should not have the right under the law to determine the liability of the vessel, yet there is no principle of law which would prevent the parties from agreeing to be bound by his decision relative thereto. A decision of a private person on a disputed fact between

two other individuals has no effect whatever as to these individuals when given without their consent or without any law authorizing such a decision. Such a decision, however, becomes binding when the two individuals have agreed that it shall be binding."

The court in its decision, after denying the validity of the bond as a common law bond, then turns about and decides that the bond is good as a common law bond; that is, the power to exact it is an incident of the Secretary's power to remit. This calls for some consideration of the principles governing so-called common law bonds. There are many decisions regarding the liability of obligors on bonds to the government where the bond does not conform to the statute or is not expressly provided for by statute. A brief discussion of the cases most favorable to the view of the government will suffice.

The two leading cases which are cited in all subsequent cases are *United States vs. Tingey,* 5 Pet. 115, and *United States vs. Bradley,* 10 Pet. 358. While the actual decision in *United States vs. Tingey* is to the effect that a bond with a consideration different from that prescribed by law required by the Secretary of the Navy of a purser in the navy as a condition of his holding his office was extorted under color of office and was invalid, the oft-quoted dictum is to the effect that the United States, being a body politic, as an incident to their general right of sovereignty have a capacity to enter into contracts and take bonds in cases within the sphere of their constitutional powers: through the instrumentality of the

proper department to which those powers are confined and approbate to the just exercise of those powers, although the making of such contracts have not been prescribed by any legislative act. The court laid this down as a general principle only, without (as it was then said) attempting to enumerate the limitations and exceptions which may arise from the disbursements of powers in our government; and from the operation of other provisions in our Constitution and laws.

The court further stated:

"We hold that a voluntary bond taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted to secure the fidelity in official duties of a receiver, or an agent for the disbursement of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. *The right to take such bond is, in our view, an incident to the duties belonging to such a department.*"

United States vs. Bradley supra cites *United States vs. Tingey* with approval and states that the United States has capacity to take a voluntary bond in cases within the scope of the powers delegated to the general government by the Constitution, through the instrumentality of the proper functionaries to whom those powers are confined.

We do not deny the capacity of the United States to enter into contracts and take bonds, etc., through the instrumentality of the proper department; we do not deny the capacity of the principle, but the authority of the agent. It is elementary that an agent

can act for the principle only within the scope of his employment. This is especially applicable to governmental officials. The two cases above and the cases that will be discussed hereinafter recognize this; that a contract within the scope of the agent's employment is valid. They decide that "the right to take such bond is * * * an incident to the duties belonging to such a department." It is simply a case of implied authority in the agent. An agent's authority may be first express; second, necessary; third, customary; fourth, apparent, that is, a principle has held hi m out as one having that authority. Nos. 2 and 3 may be put under the more inclusive head of implied authority. There can be no question concerning the authority expressly given, and where the doing of an authorized act requires the doing of something else the authority to do the second act is always implied, and customary authority may be implied. As to apparent authority or authority by estoppel, that results from a situation where *P.*, the alleged principal, holds out *A.* as agent, and *T.*, a third person, acts upon this holding out; under such circumstances *P.* is estopped to deny the authority of *A.*

The cases of common law bonds come under the implied authority of an agent. It is not necessary that a legislative enactment authorize every act that an agent may do. By giving certain authority and creating certain duties, other authority may be implied from necessity or as a proper incident to the express authority.

United States vs. Linn, 15 Pet. 290, another case upon common law bond, holds that the contract or security taken was within the implied authority of the agent; "It is the duty of all public officers intrusted with the execution of powers delegated to them to pursue the directions of the law. But to construe all such laws *as a special delegation of authority, to be strictly and literally pursued* * * * would frequently defeat the object and purpose of the law." It is not necessary to call the attention of the court to such cases as *Osborn vs. Bank of the United States,* where the court said, "It is not unusual for a legislative act to involve consequences not expressed," or to *McCollough vs. Maryland,* dealing with the doctrine of implied powers.

Postmaster General vs. Early, 12 Wheat. 136, decided by Chief Justice Marshall, is another good illustration of the grounds of liability in the so-called common law bond. In a suit upon a bond given by a deputy postmaster, Marshall clearly shows that it is a question of express or implied authority:

"the inquiry, then, is, whether, under a fair construction of the acts of congress, the Postmaster General may take bonds to secure the payment of money due, or which may become due to the General Post Office. All the acts relative to the post office make it the duty of the Postmaster General to superintend, to regulate the conduct and duties of his deputies and to collect the moneys received by them for the general post office. May not these powers extend to the tak-

ing of bonds from the officer who is to perform them? May not these bonds be considered as means proper to be used in the collection of debts and in securing them?

"If this interpretation of the words should be too free for a judicial tribunal, yet if the legislature has made it; if congress has explained its own meaning too unequivocally to be mistaken, the courts may be justified in adopting that meaning, etc." (showing congress in describing the power and duty of the Postmaster General, understood that the Postmaster General had this power).

It is needless to cite other cases; they are practically all cases of official bonds where the officer receives money and is under a duty to pay it over; or where a superior official is in charge of and responsible for the conduct of his deputies, and as an incident to his office takes bonds from his deputies for the faithful performance of their duties.

The court below held that "the power to accept or require such an undertaking is an administrative power fairly and reasonably incident to the power to remit or refuse to remit upon consideration of facts presented as a basis for desired remission." In other words, held that the bond was good as a common law bond. As already pointed out, there is no logical or necessary connection between the power to remit a penalty and the power to determine or impose a penalty.

As an example showing that the power to remit a fine does not give the holder thereof the power to

impose a fine, see *Sherlock vs. United States,* 43 Ct. of Cl. 161. The Postmaster General has the power under certain circumstances to remit the penalties incurred by postal employees, this power being based upon statute, but he cannot impose a fine upon them. In the case of *Sherlock vs. United States,* supra, the court says:

"The question before the court for decision is whether the statute quoted or any law of the United States authorizes the postmaster general to impose fines and enforce their collection as was done in this case? This court is reluctant to render a decision which will interfere with the established discipline of any other department of the government, but when a case is presented to us we are compelled to decide the law as we believe it to be regardless of the effect of such decision. We have no doubt that the rule of the post office department in question as hitherto has always been so administered as to be a great benefit to the service, but that is always true of arbitrary power when in beneficent hands; and we cannot believe that Congress ever intended to place any such power in the hands of the head of any of the departments of the government."

So the court was in error in holding that the power to exact such a bond is an incident to the power to remit penalties. It might possibly be conceived that the power to exact a bond whereby the accused agreed to pay such penalties as may have been incurred could be considered as an incident of the power to remit, but the determination of the penalty, as already pointed out, is a judicial question and one that the courts alone can determine under the provisions of this Act. No authority to make such a determina-

tion is expressly given to the Secretary and none can be implied.

Another erroneous conclusion of the court is that the application for remission (if such there be) must necessarily be an admission of guilt which binds the master after the Secretary's refusal to admit. Certain cases are cited by the court for the proposition that the party must admit his wrong in pleading for a remission. An examination of the cases cited by him does not sustain this position. The case of *United States vs. Morris,* 10 Wheat. 246, decides that under the Act of March 3, 1797, the Secretary of the Treasury has authority to remit a forfeiture under the revenue laws at any time before or after sentence until the money is actually paid over for distribution; such remission extends to the shares of the forfeiture to which the officers are entitled. The whole question was whether the rights of the officers or informers became vested upon entry of judgment so that the Secretary could not remit the share claimed by them.

The *Princess Orange,* 19 Fed. Cases, 1336, Fed. Case No. 11431, in passing on the same statute held that a proceeding for the remission of a forfeiture cannot be maintained until the forfeiture has proceeded to judgment, the court basing its opinion upon the words "shall prefer his petition to the judge of the district in which such fine *shall have accrued,*" such words not including a contingent liability. The court also cites *United States vs. Morris,* where the judge says that a strict construction of the *act* in question would forbid any application for remission

till judgment of conviction or condemnation had passed. However, taking the case of the Princess Orange according to the trial judge's interpretation, it would not mean that the master had confessed his guilt, that the filing of a petition for a remission is in itself an admission, but that the court would not consider an application for a remission until he had confessed it.

> "The petitioner, if he applied before sentence of condemnation, must equivocally admit the act of forfeiture in order to give either the judge or the secretary jurisdiction of the matter. This the petition now before you fails to do. It guardedly states 'that the jewels in the possession of Polari and considered as his property was subjected to forfeiture and that considered as his property would be so adjudged.' This if accompanied by no restrictions or qualification would be an exceedingly faint and vague admission of the fact of forfeiture. If made by Polari himself it would hardly amount to such a concession of the facts to justify a sentence of condemnation in court or afford occasion to ask for a remission. It is not inconsistent with the entire immunity of the property. When made by a third person, who denies the title of Polari, is not even an admission. Clearly it was not intended to be an admission which would bind the property if the Secretary of the Treasury refused to remit this supposed forfeiture." *The Princess Orange,* supra.

In the Princess Orange case the court held that no forfeiture had been incurred and refused to take jurisdiction. It is to be noticed that the proceeding under that statute was a legal proceeding in a court

of law where the petition was regarded as a pleading and this pleading showed on its face that no forfeiture had been incurred—quite a different situation from the present case.

We do not think it can be seriously contended that because an accused person applies for a remission of an "alleged" penalty he thereby admits his guilt; in fact, most of the applications for pardons or remissions of penalties are based upon the fact that the accused person is innocent of the crime charged or was unjustly convicted. As a matter of fact, it is stated in *United tSates vs. Morris,* supra, "Many defenses are not only consistent with the claim for remission, but furnish in themselves the best ground for extending the benefit of the Act to the party defendant. He who supposes his case not to come within the construction of the law * * * cannot be visited with moral offence either in the act charged or the defense of it, yet how is the question of right ever to be decided unless he is permitted to *try the question before a court of law*? In such a case pertenacious adherence to his offense cannot be imputed to him since resisting the suit on the one hand while he sues for remission on the other amount to no more than this, *that he denies having violated the law: but if the court thinks otherwise he then petitions for grace on the ground of unaffected mistake*: a point on which, of course, he must satisfy the Secretary before he can obtain a remission."

The other cases cited by the court as standing for the proposition that the Collector could require the

bond in question are merely cases dealing with common law bonds or implied powers of government officials; for example, *United States vs. Garlinghouse,* Fed. Case No. 15189, is such a case. *Neilson vs. Lagon,* 12 How. 97, is a case with a dictum concerning implied powers although the actual decision is that land conveyed to trustees to sell to pay debts due the United States does not violate the Act of Congress "that no land shall be purchased on account of the United States except under a law authorizing such purchase." No one questions the right of the government to take bonds through the proper officials concerning proper subjects, but we do question the right of an executive official to give to himself judicial power by exacting a bond.

The case of *Great Falls Co. vs. United States,* 16 Ct. Cl. 160, 195, cited by the court on this question of implied power, is an interesting case dealing with this subject of arbitration. In that case the Secretary of War had authority to condemn land for a certain purpose or he could purchase it. The land was acquired by sale at a fair price determined by appraisers. The court held that this was not an arbitration as the act of the appraisers was subject to the ratification of the parties in interest, that the Secretary was not bound by the prices set by the commission but was merely seeking counsel from competent advisers and their decision had only moral effect. Clearly in a case of that kind, if the owner had refused to accept the finding of the commission, the government could not have brought suit to enforce

the award (as it was not bound, the other party would not be bound), but it would have been necessary for it to condemn the land by suit or make terms with the owner. So in the present case, if one party refuses to accept the finding of the arbitrator, to wit: the Secretary of Commerce and Labor, a suit cannot be brought upon this finding of the Secretary, but it is necessary for the master's liability to be determined in a judicial proceeding against him.

There can be no hardship or injustice in holding that the Secretary of Commerce and Labor in taking the present bond giving himself the power to determine the penalties for alleged violations of the law exceeded his authority and that such determination was not legally binding. The government is not barred from bringing suit against the vessel or the master for alleged violations of the law, and can determine the guilt of the master in a proper proceeding. On the other hand, the results of executive usurpation of the functions of the judiciary are far-reaching. It does not require a close student of history to know that the life of most constitutional governments consists of the gradual growth of the functions of the executive department till executive domination results in the destruction of legislative and judicial freedom—results in a government of men rather than a government of laws. The court below in its zeal to enforce the bond seems to have overlooked this point. We need only call to the attention of this court one of its own decisions, the case of *United States vs. Kauhoe,* 147 Fed. 185, to show that

this court has consistently maintained that a government official can act only within the scope of his authority.

The overruling of the motion in arrest of judgment is urged as error. An examination of the complaint discloses that the suit is based upon a decision of the Secretary of Commerce and Labor to the effect that the master had incurred certain penalties. As pointed out in the statement of facts, the complaint recites the execution of the bond, the condition of the bond, to wit: that the principal shall pay the amount which the Department of Commerce and Labor shall upon presentation of the facts determine that the said principal is liable for on account of penalties alleged to have been incurred. The next paragraph of the complaint states that the Department of Commerce and Labor did determine that the said James F. Findlay was liable to the United States on account of certain penalties and did determine that the liability did amount to the sum of $7960.00. The third paragraph states that notice of this determination was given to the plaintiffs in error and demand made upon them. The fourth paragraph states that the amount has not been paid and that $7960.00 was due from the plaintiffs in error. The complaint contains the usual prayer for judgment. A copy of the bond is attached to the complaint.

This bond recites that whereas the Collector of Customs had given notice to the master that he had incurred penalties on account of alleged violations of

the Passenger Act and that whereas the Collector of Customs had been authorized to grant clearance upon being furnished a penal bond for $15,000.00.

"to insure the payment of such penalties for such violations aforesaid as shall be *determined* by the Department of Commerce and Labor *to have been incurred* by the said master"

after the presentation of the facts by the master and United States officials. The condition of the bond was that the plaintiffs in error should pay the amount that the Department of Commerce and Labor should determine that the principal was liable for on account of the penalties so alleged to have been incurred.

"To pay penalties as shall be determined to have been incurred" after the presentation of the facts admits of no other construction than an original determination of the facts of the "alleged" violations of the law. Further discussion of this point is unnecessary. As a matter of fact, the Collector's own letter (Exhibit 10, pp. 123-124) of April 18, 1911, to the District Attorney shows that his interpretation of the law was that he himself should determine the amount of penalties incurred and collect the same; as the Collector expressed it in his letter:

"He understood that the collector should collect the penalties" and that the misdemeanors should be submitted to the District Attorney for prosecution.

This letter also shows that the court committed error in claiming that the plaintiffs in error were estopped to deny that the master had applied for a remission of the penalties. It shows clearly that the

Collector thought it was within his power and the power of his department to determine the amount of the penalties incurred. Of course, the authority of the Collector of Customs or the Secretary of Commerce and Labor cannot be increased or created by estoppel. The plaintiffs in error could not and did not mislead the Secretary as to his own authority to take the bond in question. The elements as ordinarily given from which an estoppel arises are:

First, false representations of matters of fact made by the party sought to be estopped; *second,* for the purpose of inducing the party seeking the estoppel to act; *third,* the falsity of such representations must have been unknown to the party seeking the estoppel; *fourth,* the party seeking the estoppel must have acted upon such representations to his own detriment.

The finding of the court that the language of the bond was ambiguous and the admission of evidence to explain the alleged ambiguity is urged as error. It is difficult to see any ambiguity in the wording of the bond. Its language has been discussed in this brief, so it is unnecessary to set it out at length; it is in substance a bond to insure the payment of such penalties as shall be determined to have been incurred, and provided for the presentation of facts to the arbitrator (to wit: the Secretary) who was to make the determination. It could scarcely be more clearly expressed. Also the declaration shows the theory upon which the bond was given. Furthermore, the judgment in this case was entered for the

amount of penalties found due by the Secretary plus interest upon this amount from the date of notice of this determination, thus showing that the decision of the Secretary was regarded as determining the liability.

The court needs no authority upon the parole evidence rule; an unambiguous written instrument comprising a complete contract cannot be varied by parole, especially when such variation substitutes another and different contract from that executed by the sureties. A surety has a right to stand upon the letter of his contract, and the court cannot go back of the bond to impose upon him a greater or different liability than the one assumed.

The admissibility of the evidence offered upon the re-hearing can be briefly disposed of. If, as a matter of fact, a penalty had been legally imposed upon the principal, Findlay, by the Secretary of the Department of Commerce and Labor, then the sufficiency of the evidence would be immaterial in a proceeding upon the bond to enforce such determination. If, on the other hand, the decision of the Secretary did not amount to a legal determination of liability, all the evidence offered was immaterial and incompetent inasmuch as the suit upon the bond was not one to determine the amount of the fines and penalties, but was a suit to enforce a decision of the Secretary. (See the complaint and bond.)

Furthermore, the so-called evidence, such as the letters of the Collector of Customs to the District Attorney and to the Secretary of Commerce and Labor, respectively, the letter of the Portuguese

Consul to the Governor of Hawaii and the extract from the report of the Grand Jury, is hearsay and represents merely the opinion of the declarents as to the guilt of the master, Findlay. It is elementary that such evidence is inadmissible. That such evidence was highly prejudicial to the plaintiffs in error is shown by the attitude taken by the court thereafter throughout the proceeding.

Respectfully submitted,

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Dated February 26, 1915.

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